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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 454

CLAIBORNE-ANNAPOLIS FERRY COMPANY,
APPELLANT,

vs.

UNITED STATES OF AMERICA, ET AL., APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR CHESAPEAKE BEACH RAILWAY COMPANY, APPELLEE, IN ANSWER TO BRIEF FOR STATE OF MARYLAND, AMICUS CURIAE.

The appellant, the Claiborne-Annapolis Ferry Company, is seeking to set aside an order of the Interstate Commerce Commission authorizing the Chesapeake Beach Railway Company to extend its railroad across Chesapeake Bay by ferry. The statutory court below dismissed the bill of complaint as without merit and the Ferry Company appealed. There have been filed an

opening brief by appellant, answer briefs by appellees, and a reply brief by appellant. On February 15, 1932, the State of Maryland was granted leave to file a brief as *amicus curiae* and the Railway Company was given the right to make an answer within ten days, and the present brief is being filed pursuant to such permission. The case was argued February 18th.

Questions Presented by State of Maryland.

The contentions advanced in the brief for the State of Maryland may be grouped under four headings:

1. The order of the Commission authorizes both a railroad and a general vehicular and passenger ferry.
2. The Railway Company is seeking to evade the jurisdiction of the State of Maryland by falsely pretending to seek authority for a railroad ferry, when it is planning an exclusively general ferry.
3. There is no substantial evidence supporting that part of the certificate of the Commission authorizing a railroad ferry.
4. Only a strictly railroad ferry is within the jurisdiction of the Interstate Commerce Commission.

ARGUMENT.

I.

The correct construction of the Commission's order is that it authorized both a railroad and a general ferry.

We agree with the argument made by the State that the certificate of the Commission authorizes both a railroad and a general ferry, that is, a combination ferry

Paragraph 3 of the application filed by the Railway Company with the Commission reads as follows:

> "It is proposed to establish and operate, either directly or through a wholly owned subsidiary, a ferry for the transportation of passengers and property between the terminus of its said line at Chesapeake Beach, across Chesapeake Bay, and a point on Trippe's Bay in Dorchester County, Maryland."

Paragraph 5 reads as follows:

> "The present and future public convenience and necessity require the establishment of the proposed ferry so as to afford a direct route by rail and water between the City of Washington and surrounding territory and the eastern shore of Maryland and also provide a direct route for the transportation of automobiles and other vehicles between such points."

The report of the Commission shows beyond the possibility of doubt that both a railroad and a general ferry were proposed by the applicant and supported by the evidence (R. 18-32).

The certificate of the Commission recites that the present and future public convenience and necessity require the establishment of ferry service "as set forth in the application and said report" (R. 32, 35).

The proper construction of the certificate is that it covers both kinds of service, because that was beyond doubt the real intention of the Commission.

Under the circumstances, we agree with the State of Maryland that the broader construction, the one authorizing both kinds of service, must necessarily be

adopted. We further submit that the order so construed is valid in every respect, for reasons that we shall presently show.

II.

Charge of false pretenses and attempted evasion of State jurisdiction is unfounded.

A. Railway Company was compelled to seek authority for ferry from Interstate Commerce Commission.

The Railway Company is a common carrier subject to the Interstate Commerce Act under which the term "railroad" is defined as consisting in part of "ferries used by or operated in connection with any railroad."

The Act also prohibits under penalty of fine or imprisonment the extension of any railroad without authority from the Commission. It would be physically impossible for the Railway Company to operate a ferry across the Bay from its present eastern terminus at Chesapeake Beach without such a ferry being used by or operated in connection with its railroad.

A combination railroad and general ferry is within the province of the Commission, *New York Central & H. R. R. Co.* v. *Hudson County*, 227 U. S. 248, 57 L. ed. 499, and it would be next to impossible for an interstate railroad to own and operate a ferry without being subject in this regard to the jurisdiction of the Commission.

When the Railway Company went to the Commission for its certificate of public convenience and necessity, it made its application because it was compelled by law to do so, and not because of any desire to evade the jurisdiction of the State of Maryland.

B. There is no evidence of false pretenses.

Charges of false pretenses or bad faith should not be lightly made. Elementary justice requires that the honesty and integrity of persons should not be impugned without really sufficient cause. And yet the brief for the State makes a charge of false pretense without any supporting evidence of an affirmative nature. Indeed, the whole charge depends upon an inference drawn from the alleged lack of substantial evidence in support of the need for a strictly railroad ferry, an inference which is without justification because its premises are unfounded in fact.

III.

There is not only substantial but strong and convincing evidence of the need for a railroad ferry.

The brief for the State says that the Railway admits that the proposed operation is a general or vehicular ferry service, and that it must be conceded that the evidence of the need for a railroad ferry is negligible. These statements indicate a grave misunderstanding of the issues and the facts of record in the case. The Railway Company applied to the Commission for authority for a combination railroad and general ferry, and has at all times maintained that this was the object it had in view. It has likewise consistently maintained that there was substantial and convincing evidence of the need for both kinds of service, and this contention was upheld by the Commission.

The lower court found that there was substantial evidence in support of the need for a strictly railroad ferry (R. 47). Indeed it brushed aside the contention

of the Ferry Company to the contrary, with hardly more than a passing comment. This summary disposition of the matter is fairly indicative of the flimsy nature of the allegation of a lack of substantial evidence.

There is not only evidence but substantial evidence, and not only substantial evidence but a large amount of it in support of the need for a strictly railroad ferry.

Seven witnesses testified to the comparative isolation of the Eastern Shore of Maryland and to the need for additional transportation facilities, particularly for east and west traffic (R. 70, 87, 90, 91, 97, 100, 102). Even the vice-president of the Ferry Company, the most partisan of witnesses, let it escape during the course of his testimony that there has been for years an agitation in favor of increased transportation facilities for the Eastern Shore (R. 115).

The secretary of the Washington Chamber of Commerce, a man whose position requires an intimate knowledge of transportation conditions in Washington and vicinity, testified to the need of better means of transportation between Washington and the Eastern Shore, and his evidence shows that he had in mind all forms of transportation, and not automotive vehicles alone (R. 101, 102).

A witness for the Railway Company asserted that the ferry would handle passengers and package freight moving in conjunction with the railroad, and for the accommodation of this business, the tracks of the Railway Company are to be extended from their present eastern terminus at Chesapeake Beach, a distance of 2,200 feet over the causeway and wharf to a point parallel with the proposed ferry slip, and a freight sta-

tion and a passenger station will be built on the Eastern Shore at Hudson. (R. 67, 68, and Exhibit 16, corrected).

A wholesale dealer in gas and electric appliances of Washington gave evidence that he could use the proposed ferry to good advantage in making less-than-car-load shipments to the Eastern Shore (R. 100).

It is not true, as the State asserts, that all the estimates of ferry revenue are based on traffic, no part of which passes over the existing railroad line. Mr. Fox, vice-president of the Railway Company, a railroad man of wide experience, stated that the earnings of both freight and passenger traffic would be naturally increased by the existence of a ferry service (R. 62). In explaining how he arrived at his estimate of 182,500 passengers, he stated:

> "Assuming that we would handle two hundred and fifty cars per day, average, and the further assumption that each car would contain two paid passengers together with the prospective business that might be handled in connection with bus lines *or in connection with our railroad which would bring the passengers to and from the ferry,* we arrived at that figure" (R. 67). (Italics ours.)

It is true that there are no elaborate separate estimates of revenues anticipated from strictly railroad traffic passing over the ferry. But such estimates are not the sole means by which proof of public convenience and necessity may be established. In the nature of things they are but predictions and little better than guesses. The important inquiry is always whether the

community into which the extension is projected is in need of the service. An extension is necessarily in the public interest if it relieves the situation in a territory inadequately served by present transportation facilities. *Construction of Line by Wenatchee Southern Ry. Co.*, 90 I. C. C. 237, 255; *Gt. Northern Ry. Co. Construction*, 166 I. C. C. 3, 39. In the former case the Commission pertinently observed that the history of railroad construction illustrates that prospective tonnage depending for its development upon transportation facilities rather than tonnage immediately in view has been the main justification for railway construction.

This Court held in *Texas and N. O. R. R. Co.* v. *Northside Belt Ry. Co.*, 276 U. S. 475, 72 L. ed. 661, 663, that the purpose of paragraphs 18 to 22 of Section 1 of the Act is to prevent interstate carriers from weakening themselves by construction or by operation of superfluous lines and to protect them from other carriers' operating in interstate commerce a competing line not required in the public interest.

It was, we submit, no part of the purpose of the law to prohibit railroads from building extensions into communities in need of additional transportation facilities. It obviously cannot be said of such extensions that they are superfluous or are not required in the public interest.

Proof of the inadequacy of present facilities is of itself sufficient evidence to support a finding by the Commission that public convenience and necessity require the construction of the extension. In this case there is testimony from Mr. Fox, a man with a lifelong experience in railroad affairs, that a railroad ex-

tension would supply an existing public need. The Commission was entitled to believe this evidence. It was moreover entitled, once the inadequacy of present facilities was established, to draw the inference that the situation could be met by a railroad extension. It did draw this very inference and its conclusion on this question of fact peculiarly within its province as an expert tribunal is not open to question. It is certainly not open to the State to establish the contrary by mere argument to the effect that the proper inference is that the public requirements can be met by automotive transportation alone and not in any part by a railroad extension.

The only evidence that could possibly be construed as showing that there is no need for railroad service is the fact that the Claiborne-Annapolis Ferry Company handled little or no freight in the years 1922 to 1928 (R. 185). But it had never attempted to develop any business of this sort (R. 121). It had no incentive to do so because even without handling freight it often has more business than it can handle (R. 103). The only railroad connection with the Claiborne-Annapolis Ferry Company is the Washington, Baltimore and Annapolis Railway Co., an electric inter-urban line (R. 1, 20), which so far as this record shows may or may not interchange freight with the national transportation system of steam railroads.

The Railway Company, on the other hand, interchanges with both the Baltimore & Ohio and the Pennsylvania railroads, and it would have an incentive to develop a freight business, because unlike the Claiborne-Annapolis Ferry Company, its revenues from this busi-

ness would not be limited to ferriage across the Bay but would also include compensation for the movement over its rail lines.

The record contains affirmative evidence, however, that the new ferry will be able to secure passengers other than those traveling in automobiles and busses. The record shows that 780 cars a day go to Claiborne, the eastern terminus of the old ferry (R. 73). Only 209 vehicles a day, however, use the ferry across the Bay (R. 117). It is fair, we think, to infer, as appellant did in its opening brief (p. 58) that the remaining automobiles came to Claiborne simply to transport passengers to or from the ferry. This shows that the old ferry has passengers in considerable number who do not cross in automobiles or busses. It is not unfair to infer that some of them use the Washington, Baltimore and Annapolis Railroad. These circumstances afford a reasonable basis for believing that there is a class of travelers who could be attracted to the combination rail and water service projected by the Railway Company.

The evidence reviewed above is but part of that supporting the need for a railroad ferry, but it is sufficient to show that what the record contains is not only substantial but convincing evidence on this point.

IV.

Most of the evidence relates to need for general ferry because that was sole controverted issue before Commission.

The brief for the State of Maryland contends that the decision of the Commission is confined to a discus-

sion of the advantages of a general as opposed to a railroad ferry service across the Bay.

While this is not altogether true, as a reading of the decision will disclose, it nevertheless is a fact that much of the report is devoted to the general ferry aspects of the application. The same thing is true of the evidence of record although to a much less pronounced degree.

What is the explanation for this situation?

The reason is simple. Although wide notice was given of the application for a combination railroad and general ferry, there was but one party to the proceeding before the Commission other than the applicant Railway Company. No railroad serving the Eastern Shore came in with an objection that the proposed extension would invade its territory. The only intervenor was the Claiborne-Annapolis Ferry Company, operating a general ferry across the Bay some twenty to thirty miles distant from the new project. It had no representations to make about a railroad ferry. Indeed even after the decision of the Commission had been rendered, it filed a petition for modification in which it said:

> "4. That your petitioner does not question the authority or the wisdom of this Honorable Commission in granting to the applicant a Certificate of Public Convenience and Necessity if the Commission construes the application of the Chesapeake Beach Railway Company in this case to be an application for a certificate authorizing an extension of its railroad". (R. 170).

At the hearing, there was no controversy between the only two parties, the Railway Company and the Ferry Company, as to the need for a railroad ferry.

The Railway Company of course had the burden of sustaining its application relating to railroad ferry service; and as we have already seen, it met this burden by offering substantial and convincing evidence.

But the only controverted issue related to the need for a general ferry, which was disputed by the Ferry Company, and it is only natural that the Railway Company should have shaped its presentation with this fact in view, and that the emphasis should have been placed on establishing the disputed, rather than the undisputed, point in the case. It is likewise natural that the evidence on this point was of a larger volume, and that the Commission in its report should have concerned itself very largely with the great mass of evidence on the only controverted issue.

V.

State of Maryland should not be allowed at this late date to raise issues of fact in this Court.

In accordance with the Act (Section 1 (19)) the State of Maryland was given due notice of the application for a combination railroad and general ferry, when it was filed with the Commission by the Railway Company. The Public Service Commission of the State thereafter advised the Federal Commission that it did not desire to make any representations in the proceeding (R. 18).

After the report and order in this case had been issued, and the Ferry Company had petitioned for a modification of the order, the Maryland Commission wrote to the Interstate Commerce Commission protesting against an assertion on brief by the Railway Company that the State was estopped to object to the order.

In this letter it reiterated that it had no representations about any extensions either by land or water which the Railway Company might desire to make for interstate business, but said that if the Railway Company undertook an intrastate business without its consent, it would be compelled to apply to the courts for the protection of its authority and the sovereignty of the State. No action by the Interstate Commerce Commission was requested, and it is difficult to understand the complaint of the State (Brief, 6) that no action was taken upon this protest.

If the Maryland Commission had desired action by the Interstate Commerce Commission it could and undoubtedly would have intervened in the manner provided for by the rules, which it had the undoubted right under the Act to do. But what the Maryland Commission intended by this letter was obviously to threaten the Railway Company with court proceedings, rather than to request any action by the Interstate Commerce Commission. Even as to the Railway Company, the threat of a suit was only in the event of an attempt to engage in intrastate business without authority of the State.

The State thus declined to take part in the proceedings before the Commission, the body appointed by law to hear and determine the facts in cases of this kind. The application of the Railway Company, like the certificate later granted, was for an extension for both railroad and general ferry purposes, and if the State had any representations of fact to make, the appropriate time and place was at the hearing before the Interstate Commerce Commission.

If it desired to show that there was no need for railroad ferry service; if it desired to establish that the Railway Company was actuated by false pretenses, it should have presented its evidence to the Federal Commission.

After having failed and refused to put those questions of fact in issue before the appointed tribunal, it now seeks to raise them for the first time before this Court in a brief as *amicus curiae* filed at the last minute.

Its action, we submit, comes too late.

This is true with respect to the charges of false pretenses and of attempted evasion of the State's jurisdiction. It is likewise true with respect to the charge that there is no evidence to support the order. All of these charges are dependent upon factual proof, upon which the administrative tribunal should have been allowed to pass in the first instance.

VI.

Both the railroad and general and vehicular business of a ferry used by or operated in connection with an interstate railroad are under the Interstate Commerce Commission.

In its brief the State attempts to draw a sharp distinction between a railroad ferry and a general ferry. None of the cases it cites, however, arose under the Interstate Commerce Act, the statute here involved. It may well be that there is a distinction between the term "railroad ferry" and that of "ferries used by or operated in connection with any railroad" as used in Sec-

tion 1 (3) of the Act, and hence there is no point in talking about the proper definition of "railroad ferry" when this case is concerned with the definition of a different term "ferries used by or operated in connection with any railroad". However that may be, the latter term, which is the one in issue here, was authoritatively defined by this Court in *New York Central & H. R. R. Co.* v. *Hudson County*, 227 U. S. 248, 57 L. ed. 499, as including a combination railroad and general ferry, such as is covered by the certificate granted the Railway Company in this case.

The proposed ferry will even in its general ferry business be engaged in interstate commerce. It will convey across the Bay busses, trucks and private automobiles on journeys from points in the lower Eastern Shore of Maryland and Virginia to points in other States. Busses and trucks so engaged are beyond the regulatory power of States. *Buck* v. *Kuykendall*, 267 U. S. 307, 69 L. ed. 623; *Bush & Sons* v. *Maloy*, 267 U. S. 317, 69 L. ed. 627.

In conveying vehicles moving in interstate commerce across a navigable water of the United States, the ferry will itself be engaged in interstate commerce. *Harmon* v. *Chicago*, 147 U. S. 396, 37 L. ed. 216; *Moran* v. *New Orleans*, 112 U. S. 69, 28 L. ed. 653; *Foster* v. *Davenport*, 22 How. 244, 16 U. S. L. ed. 248.

The mere fact that the part of the movement participated in by the ferry will be from one point to another within the State of Maryland does not prevent the traffic from being interstate under the circumstances here involved. *United States* v. *Erie R. Co.*, 280 U. S. 98, 74 L. ed. 187 (annotated); *United States* v. *Union*

Stock Yard & Transit Co., 226 U. S. 286, 57 L. ed. 226.

It is immaterial whether the participating carriers are parties to some common control, management or arrangement for a continuous carriage or shipment. *Railroad Commission* v. *Worthington*, 225 U. S. 101; 56 L. ed. 1004; *The Daniel Ball* v. *United States*, 10 Wall. 557, 19 U. S. L. ed. 999.

The ferry will be under the admiralty jurisdiction of the United States and will be inspected under the Steamboat Inspection Laws. *Section* 4426 *Revised Statutes, U. S. C. Title* 46 *c.* 14, *par.* 404; *The Daniel Ball* v. *U. S.*, 10 Wall. 557, 19 U. S. L. ed. 999; *Vidalia* v. *McNeely*, 274 U. S. 676; 71 L. ed. 1292, 1295.

Since both the railroad and the general ferry business of the extension will be within the Federal field, the provision of Section 1 (20) of the Act, that the holder of a certificate of public convenience and necessity may, without securing approval other than such certificate, proceed with the operation of such extension, must be given full force and effect, and the Commission's order authorizing a combination railroad and ferry service must be regarded as wholly within its competency.

CONCLUSION.

The evidence in this case shows that interstate commerce is being impeded by the lack of transportation facilities across Chesapeake Bay, a navigable water of the United States.

It also shows that the Railway Company, a common carrier in interstate commerce, is unable to draw a sufficient amount of traffic from the restricted territory

which it now serves, making for some uncertainty as to whether it will be able under existing conditions to continue to fulfill its present public service obligations. It shows, moreover, that if permitted to extend its service across the Bay and develop new traffic from that fertile and productive region, its prospects of survival, and its continued public service, in increased measure, will be assured. The Commission rightly found on a record containing substantial and convincing evidence that both a railroad and a general ferry service were justified, and its certificate to that effect should be upheld.

Respectfully submitted,

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